No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

vs.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Following a comprehensive review of the text, history and purpose of the Alien Tort Statute ("ATS"), this Court held that the ATS is a jurisdictional statute authorizing federal courts to remedy certain universally proscribed violations of the law of nations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–15, 720, 731–32 (2004). In particular, this Court endorsed the line of cases following *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which consistently applied the ATS to human rights violations occurring on foreign soil. *Sosa*, 542 U. S. at 732.

Respondents and their *amici* essentially seek to reverse *Sosa*, to overrule *Filartiga* and its progeny, and to nullify the ATS as a means of redressing universally condemned human rights violations. They rely on *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), to ask this Court to do what no court has ever done: apply a novel version of the presumption against extraterritoriality to find that the ATS reaches conduct occurring on U.S. soil or on the high seas but not on the territory of foreign sovereigns. Respondents' Supplemental Brief ("RSB") 13.

But the presumption does not apply to this jurisdictional provision any more than it applies to common law adjudication of transitory torts under 28 U.S.C. § 1332. *Morrison*, 130 S. Ct. at 2877. Even if

it did, the ATS's textual commitment to the adjudication of universally accepted law of nations norms, such as piracy, which are by their very nature extraterritorial, rebuts the presumption.

Nor is there any basis for Respondents' contention that the extraterritorial exercise of ATS jurisdiction violates international law. RSB 37–38. The ATS is an exercise of adjudicative, not prescriptive, jurisdiction. The founders viewed the ATS as exercise of the jurisdiction of courts to adjudicate civil claims arising anywhere based upon universal proscriptions and the common law principles of the time.

Moreover, even if the ATS were an exercise of prescriptive jurisdiction, it would be entirely consistent with international law. Under accepted principles of universal jurisdiction, the United States may adjudicate civil claims for violations of the fundamental human rights norms Petitioners assert here.

The hyperbolic attacks on the ATS by Respondents and their *amici* lack any empirical basis and are more appropriately addressed to Congress. Despite more than thirty years of extraterritorial human rights litigation, Congress has never restricted the ATS in any way. Instead, the one time Congress considered the ATS it explicitly endorsed and strengthened the *Filartiga* line of cases. *Sosa*, 542 U.S. at 731; Brief of Human Rights First et al. as *Amicus Curiae* in Support of Petitioners at 4 (No. 10-

1491) (filed June 12, 2012); Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance at 10-11 (No. 10-1491) (filed June 13, 2012) ("USSB").

The *Sosa* framework functions well in balancing the relevant concerns in extraterritorial ATS cases. *Sosa* limited the scope of the ATS to universally accepted and specifically defined fundamental human rights norms, thus ensuring that it applies to norms that bind all States. As cases from *Filartiga* through *Sosa* have explained, today the torturer, slave trader, human trafficker, or *genocidaire* has become – *hostis humani generis* – an enemy of all mankind.

This Court instructed lower courts to give great consideration to the views of the U.S. government in deciding whether particular cases raise foreign policy concerns that require dismissal. *Sosa*, 542 U.S. at 733 n.21. *Sosa* recognized that case-specific doctrines can weed out inappropriate ATS cases or deliver them to more appropriate fora. Respondents' proposed reinterpretation would render *Sosa*'s discussion of limiting principles superfluous. *Id.*

Respondents' position would dismantle the *Sosa* framework and render the ATS a nullity. It would prevent the victims of the universally condemned human rights violations from bringing ATS claims against perpetrators found in the United States. But this country has never had a policy of

providing safe haven to the architects or abettors of such violations, be they individuals or corporations. Indeed, the First Congress passed the ATS so that our country would not become a safe haven for pirates or other enemies of mankind.

Respondents offer no persuasive reason to abandon this Nation's commitments to human rights and the enforcement of the law of nations. Even if they did, it is up to Congress to balance those commitments against the policy arguments advanced by Respondents and their *amici*.

RESPONSE TO RESPONDENTS' STATEMENT

Respondents cite objections in three other pending ATS cases to contend that ATS cases pose insurmountable foreign policy problems. RSB 5–6.[1] However, those cases reveal that federal courts are fully capable of addressing the foreign policy implications of ATS litigation. *See* Brief of Former United States Diplomats Diego Asencio et al. as *Amici Curiae* in Support of Petitioners at 16-18 (No. 10-1491) (filed June 13, 2012).

Respondents' reference to the *Apartheid* litigation is misleading. RSB 5. The Maduna statement addressed complaints filed against dozens of corporations which contained requests for intrusive equitable relief. After *Sosa*, plaintiffs amended the

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[1] Petitioners also respectfully refer to their prior Statement.

complaints, dismissed almost all of the defendants, and narrowed the relief requested. *In re South Africa Apartheid Litigation*, 617 F. Supp.2d 228, 241–42 (S.D.N.Y. 2009). The South African government endorsed the reformulated litigation and withdrew its prior objections. *See* Appendix A.

In *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 61–62 (D.C. Cir. 2011) ("Exxon"), Indonesia's concerns were found insufficient to warrant dismissal under the political question doctrine. Discovery in the case, however, was circumscribed in response to those concerns. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 29 (D.D.C. 2005).

In *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1195 (C.D. Cal. 2005), the district court, following submissions by Colombia and the United States, dismissed plaintiffs' ATS claims based on the political question doctrine, not because their claims arose in Colombia.

Respondents also reference a 2002 letter from the Nigerian attorney general objecting to this litigation. RSB 5; J.A. 128–31. The United States did not join in that objection or request dismissal of this case on foreign policy grounds. Nothing in the record indicates that the current Nigerian government objects to this lawsuit.

ARGUMENT

I.

SOSA WAS PREMISED ON THE APPLICATION OF THE ATS TO HUMAN RIGHTS VIOLATIONS OCCURRING ON FOREIGN SOIL.

Sosa embraced the extraterritoriality of the ATS. The ATS claim arose out of conduct occurring exclusively within Mexico and involved only Mexican nationals.[2] The application of the ATS to human rights claims arising on foreign soil was central to the briefing,[3] oral argument,[4] and the Court's analysis and holdings.

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[2] Dr. Alvarez' claims under the Federal Tort Claims Act were dismissed precisely because they arose exclusively in Mexico. *Sosa*, 542 U.S. at 712.

[3] The issue of the extraterritorial reach of the ATS was raised in the *Brief for the United States as Respondent Supporting Petitioner* at 46–50; *Reply Brief for the United States as Respondent Supporting Petitioner at* 19–20.

[4] Transcript of Oral Argument, *Sosa v Alvarez-Machain*, No 03-339, 6, 12, 39–40, 60. Respondents claim that *Sosa* is explained by the U.S. involvement in the kidnapping. RSB 31 n.16. The possibility that U.S. actors might commit, direct or abet violations abroad reinforces the inapplicability of the presumption against extraterritoriality because such violations were surely among the claims for which the First Congress intended to create a federal forum. Supplemental Brief of *Amici Curiae* Professors of Legal History William R. Casto et al. in Support of Petitioners at 27–30 (No. 10-1491) (filed June 13, 2012) ("Historians' Br.").

Sosa considered whether the ATS was "stillborn" in the absence of legislation creating a cause of action and, if not, what causes were actionable. 542 U. S. at 714, 719. This Court held that the ATS allowed for the litigation of a narrow set of common law tort actions derived from the law of nations. *Id.* at 719, 721. In so holding, the Court specifically endorsed the *Filartiga* line of cases. *Id.* at 732.[5] Congress was presumed to have in mind at least three paradigmatic Blackstonian norms: safe conducts, attacks on ambassadors and piracy. *Id.* at 724. Violations of all three norms, including piracy, could be committed extraterritorially.

The Court noted that the modern law of nations protects individuals from egregious abuses committed by their own governments within their territories. *Id.* at 727. Accordingly, the opinion discusses the potential for collateral consequences given that the ATS does not apply to "purely domestic conduct." *Id.* The Court explicitly tailored its standards to these concerns. *Id.* at 727–28.

The Court's discussion of exhaustion of domestic remedies similarly presumes the ATS's extraterritorial reach. Exhaustion would only apply to claims arising in foreign States. *Id.* at 733 n.21. Similarly, the Court's discussion of the *Apartheid* cases makes sense only if the ATS reaches human rights violations arising in South Africa. *Id.*

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[5] This endorsement was criticized in Justice Scalia's concurrence. *Id.* at 743–44.

ATS cases have consistently applied the statute to conduct occurring on foreign soil. The issue was thoroughly briefed and achieved a clear majority in *Sosa*, and the holding has been uniformly applied by the lower courts. No court has ever held that the ATS is limited to conduct on U.S. soil. *See* Supplemental Brief of Rutgers Law School Constitutional Litigation Clinic as *Amicus Curiae* in Support of Petitioners at 13–22 (10-1491) (filed June 12, 2012). Respondents have advanced no compelling reason to overturn *Sosa* or *Filartiga*.[6]

II.

THE PRESUMPTION AGAINST EXTRATERRITORIALITY DOES NOT APPLY TO THE ATS BUT, EVEN IF IT DOES, IT IS REBUTTED.

A. The Presumption Does Not Apply to the ATS.

1. The Presumption Does Not Apply to Jurisdictional Statutes.

The presumption against extraterritoriality does not apply to jurisdictional provisions. *Morrison*, 130 S. Ct. at 2877; *Exxon*, 654 F. 3d at 23. Under Respondents' theory, 28 U.S.C. § 1332 would apply only to conduct arising within U.S. territory,

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[6] *See* Brief for *Amici Curiae* Abukar Hassan Ahmed et al. in Support of Petitioners at 12–23 (No. 10-1491) (filed June 13, 2012) ("Ahmed Br.")

contrary to long-established jurisprudence. *Exxon*, 654 F. 3d at 23. More precisely, it is not the ATS that applies extraterritorially; it is the law of nations that applies worldwide.

The ATS does not differ categorically in this regard from adjudication of international diversity claims. RSB 19. Both involve common law claims which Congress has assigned to the federal courts.

2. The Presumption Does Not Apply Because the ATS Does Not Impose U.S. Domestic Regulatory Law on Extraterritorial Conduct.

The ATS does not impose substantive U.S. regulation upon foreign conduct. The substantive, conduct-regulating norms in ATS litigation are derived from international law. Only the procedural and remedial aspects of the claim are derived from domestic law.

Just as diversity jurisdiction over transnational transitory tort claims is appropriate, ATS jurisdiction over parties properly before the court is not only appropriate, it was assumed by founding era jurisprudence. *See* Historians' Br. 25–26 & n.15; Supplemental Brief of EarthRights International as *Amicus Curiae* in Support of Petitioners at 18-23 (No 10-1491) (filed June 13, 2012) ("ERI Br.").

Respondents err in claiming that U.S. courts apply only foreign remedial law in transitory tort

cases and that, as a result, ATS claims somehow differ from other transitory tort claims. RSB 17–19. In fact, the procedural and remedial rules governing transitory cases are forum-based. Restatement (Second) Conflicts of Laws, §§ 123–24 (1971). The substantive law is determined by the forum's choice of law rules, which sometimes point to forum law. ERI Br. 18–23. Thus, forum law governs many aspects of an ordinary transitory tort case.

Respondents rely on early twentieth century cases to support their view that transitory tort cases are invariably governed by the law of the place of the tort. RSB 17. But, as Professors Goldsmith and Brilmayer explain, that era marked a change in the approach to transitory torts that viewed them as "vest[ing]" exclusively under the law of the place of the tort. Lea Brilmayer, Jack Goldsmith & Erin O' Hara O'Connor, *Conflict of Laws: Cases and Materials* xxvii (6th ed. 2011). Transitory tort cases contemporaneous with the passage of the ATS applied forum law. *See* Historians' Br. 13; ERI Br. 22. The early twentieth century vested rights approach did not exist in 1789 and has largely been abandoned today. Brilmayer, Goldsmith & O'Hara O'Connor, 21; ERI Br. 21–23.

In any event, the ATS adjudicates law of nations norms applicable worldwide. The founders understood the law of nations to be the same in every jurisdiction and enforceable by common law courts. *Sosa*, 542 U.S. at 730; Historians' Br. 8–14, 33 n.22; ERI Br. 7–10. Then, as now, there was no uniformity

among domestic legal systems.[7] A supposed requirement of uniformity of domestic procedures or remedies worldwide conflicts with this Court's holding in *Sosa* that the First Congress intended the ATS to function immediately without further Congressional action. 542 U.S. at 714.

B. Even If the Presumption Applies to the ATS, It Is Rebutted by the Text and Historical Context of the ATS.

1. The Text of the ATS Demonstrates Its Extraterritorial Application.

Even if the presumption against extraterritoriality applies to the ATS, it is rebutted. Where controlling, the presumption restricts a statute's application to U.S. territory; it does not permit application on the high seas. *Sale v. Haitian Ctrs Council*, 509 U.S. 155, 173 (1993). The fact that the ATS applies to piracy is sufficient to rebut the presumption. RSB 26, 43 n.23; *Exxon*, 654 F.3d. at 21–22.

The presumption is based on an assumption that Congress ordinarily is occupied with domestic concerns. *Morrison*, 130 S. Ct. at 2877, but that is

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[7] Respondents' argument, RSB 18–19, that it offends foreign sovereignty to recognize a claim under U.S. law that does not exist under foreign law has been explicitly rejected by this Court. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964); ERI Br. 20.

not the case here, since the law of nations is by definition worldwide. As this Court stated in *Morrison,* the presumption is *not* a clear statement rule. *Id.* at 2883. *Morrison* instructs courts to consider the "focus" of a statute to determine whether Congress intended extraterritorial application. *Id.* at 2884. The presumption is rebutted where, as here, the statute's text and context indicate that it has extraterritorial application. *United States v. Bowman*, 260 U.S. 94, 98 (1922); *see also* Historians' Br. 25–35 (discussing piracy statutes in *Palmer* and *Smith* cases).

The ATS's language demonstrates a geographic scope as broad as the violations it enforces. *See* Petitioners' Supplemental Opening Brief ("PSOB") 1, 22. There is no evidence that despite the plain language, Congress intended, *sub silentio*, to restrict federal court jurisdiction only to violations occurring on U.S. soil.

Although every phrase in the ATS contemplates extraterritorial application, Respondents demand more of the First Congress. They demand an explicit statement of extraterritorial application – a requirement that *Morrison* does not impose – by referring to modern statutes in which Congress has done so. RSB 20–22. But such explicit language is not required. *Morrison*, 130 S. Ct. at 2883. Furthermore, it make little sense to apply modern jurisprudence to circumscribe the geographic

scope of the First Judiciary Act.[8] *Exxon*, 654 F.3d at 22.

2. The Historical Context Confirms the Extraterritorial Scope of the ATS.

The law of nations and treaty violations of the founding era were not limited to conduct within U.S. borders or the high seas. All three Blackstonian norms, including piracy, could involve conduct occurring on foreign soil. 1 James Kent, *Commentaries on American Law* 173 (1826) ("So if any person concerned in any particular enterprise or belonging to any particular crew should land and commit robbery on shore such offender shall also be adjudged a pirate"); Historians' Br. 5–6, 27–30.[9]

The fact that the Marbois incident occurred in Philadelphia does not support Respondents' view that Congress intended to limit the scope of the ATS to U.S. territory. RSB 27. If an ambassador had been attacked on foreign soil, it is inconceivable, given the Marbois controversy, that the First Congress would have excluded his claim from ATS jurisdiction and

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[8] *In Sosa*, this Court rejected similar arguments that modern cases limiting the circumstances in which federal courts should find implied statutory rights of action for damages should apply to the ATS. *Sosa*, 542 U.S. at 727, 729–30. *See Alexander v. Sandoval*, 532 U.S. 275, 279–81 (2001).

[9] 3 Emmerich de Vattel, *The Law of Nations* (Simeon Butler 1820)("Vattel") ch. 17, § 268, (a safe conduct applies not only in a sovereign's territory, but everywhere his troops may be).

forced him to seek redress in state courts had his attacker been found in the United States.

Respondents fail to acknowledge the importance of the incorporation of the law of nations into U.S. law. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 228 (1796). The founders accepted the law of nations as part of this Nation's common law inheritance and understood it to apply worldwide even though it was enforced through widely varying domestic legal systems. Historians' Br. 7–14. These norms are inherently extraterritorial. Vattel, the foremost expert on the law of nations in the founding era, recognized egregious violations that could be remedied even if committed on foreign soil. 1 Vattel, *Law of Nations*, ¶ 233; PSOB 10. Respondents' attempt to distinguish Vattel, RSB 25 n.11, fails: Vattel identified extraterritorial law of nations violations such as arson and assassination.

Respondents do similar injustice to other historical sources:

Bradford – The materials attached in the PSOB Appendix demonstrate that the attacks took place within the territory of Sierra Leone, that settlements on land were plundered and destroyed, and that compensation was sought for these acts. Attorney General Bradford found the ATS was available to the British victims of the attack. Breach of Neutrality, 1 Op. Atty. Gen. 57, 59 (1795); Historians' Br. 18–25.

Respondents' argue, RSB 29–30, that the Bradford Opinion might be explained by the existence of a treaty but this "is certainly not obvious." *Sosa*, 542 U.S. at 721. Even if Bradford was referencing a treaty, the concession that the ATS applies to a treaty governing conduct on foreign soil admits the extraterritorial intent, scope and application of the ATS.

This Court has already determined that the Bradford Opinion is important evidence of Congressional intent. *Sosa*, 542 U.S. at 721. Not only is it the Justice Department's first statement on the meaning of the ATS issued only six years after the First Judiciary Act, but Attorney General Bradford was the prosecutor in the Marbois incident. *Id.* The Bradford Opinion refutes any contemporary argument that Congress, *sub silentio*, limited the geographic scope of the ATS.

ATS–era Precedents – Neither *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793), nor *Bolchos v. Darrel*, 3 F. Cas 810 (D.S.C. 1795), holds that a U.S. connection was a prerequisite for subject matter jurisdiction under the ATS. These cases do evince a concern for providing a federal forum for suits by aliens claiming violations of the law of nations, given the fact that even extraterritorial suits were cognizable in state courts at the time. *See, e.g.*, *Johnson v. Dalton*, 1 Cow. 543 (N.Y. Sup. Ct. 1823).

Blackstone – In the sections cited by Respondents, RSB 24–27, Blackstone includes the law of nations as part of his Commentaries on the

Laws of England. Blackstone's focus is on *English* domestic law and *England's* obligation to protect ambassadors and to respect safe conducts. Nothing in Blackstone suggests that the international norms would not apply to an assault on an ambassador or a violation of a safe conduct that occurred on foreign soil.

III.

THE ADJUDICATION OF PETITIONERS' ATS CLAIMS DOES NOT VIOLATE INTERNATIONAL LAW.

A. The ATS Does Not Project U.S. Regulatory Law Beyond Our Borders.

Respondents' *Charming Betsy* argument depends upon characterizing the ATS as an exercise of prescriptive jurisdiction – *i.e.* the United States imposing its regulatory law on conduct occurring abroad. They base their argument on Restatement (Third) of Foreign Relations Law ("Restatement Third") §402 (1987), but the Restatement itself indicates that the jurisdiction to prescribe only applies to regulatory statutes (e.g. securities regulation). *See* Restatement Third pt. IV, ch. 1, subch. A, intro. note; ERI Br. 15-18; Supplemental Brief of *Amici Curiae* International Law Scholars in Support of Petitioners at 24–26 (No. 10-1491) (filed June 13, 2012).

Such limits do not apply to adjudicative jurisdiction over transitory torts. Courts have

jurisdiction to resolve disputes between parties properly before them. PSOB 37–39. Restatement Third, §401(b). Here, Plaintiffs were all U.S. residents, having received asylum in the United States, and the district court had personal jurisdiction over Respondents.

Moreover, the federal common law cause of action recognized in *Sosa* enforces universally accepted international standards of conduct, not U.S. domestic law.[10] *Sosa*, 542 U.S. at 713; *see* Supplemental Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners at 8–9 (No. 10-1491) (filed June 13, 2012) ("Yale Br."). Here, Plaintiffs seek to enforce universal norms prohibiting torture, extra-judicial execution, and crimes against humanity. J.A. 42, 79–87. All of these norms are derived from the law of nations.

Respondents conflate a domestic remedy – *i.e.* the recognition of a cause of action, a procedural requirement imposed by domestic law – with creation of substantive law and exercise of prescriptive jurisdiction under international law. RSB 14–16.

Other countries have made their own remedial choices to redress conduct in violation of the law of

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[10] *See* Historians' Br 30–35 (describing how, when law of nations prohibition against the slave trade emerged, U.S. courts willingly adjudicated cases as they had based on earlier universal prohibitions such as piracy).

nations. RSB 16. Both the United Kingdom and the Netherlands assert the same extraterritorial jurisdiction in their own courts that they complain about in this case. Several *amicus* briefs describe in detail the myriad ways in which other jurisdictions allow extraterritorial civil jurisdiction to enforce international law. *See* Yale Br. 28–40; Brief of Professor Alex-Geert Castermans et al. as *Amici Curiae* in Support of Petitioners at 7–26 (No. 10-1491) (filed June 13, 2012); Brief of the European Commission on behalf of the European Union as *Amicus Curiae* in Support of Neither Party at 23–26 (No. 10-1491) (filed June 13, 2012) ("EU Br."); *see generally* Brief of *Amici Curiae* English Law Practitioners Martyn Day et al. in Support of Petitioners (No. 10-1491) (filed June 13, 2012).

Congress violated no international prohibition in making federal courts available for the adjudication of torts committed in violation of the law of nations, wherever they arise against tortfeasors found in the United States.

B. The *Charming Betsy* Principle Does Not Bar Petitioners' Claims.

The *Charming Betsy* canon, stating that a statute ought to be construed not to violate international law, by definition requires Respondents to prove an international law prohibition on ATS jurisdiction. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

There is no basis for Respondents' claim that the ATS violates international law. Indeed, the United States rejects this position. USSB 3, 14 n.3. Nothing in international or U.S. law restricts the sovereign authority of the United States to punish offenses against the law of nations.

The principle that States may act absent a specific prohibition in international law is a foundational principle of international law.[11] As the Permanent Court of International Justice held, "restrictions upon the independence of States cannot . . . be presumed." *S. S. Lotus (Fr. v. Turk.)*, [1927] P.C.I.J. (ser. A.), No. 10, at 18 (Sept. 7). Thus, in international law, as under the *Charming Betsy*, the burden is on those seeking to restrict the jurisdiction of States.

Respondents and their *amici* claim that this principle has been "abandoned." RSB 44 n.24. Respondents' position is based upon quotations taken out of context. They cite sovereign immunity cases, not cases concerning extraterritorial civil jurisdiction. *See, e.g., Jones v. Ministry of Interior for the Kingdom of Saudi Arabia*, [2006] UKHL 26, ¶ 35; *Zhang v. Zemin*, [2010] NSWCA 255, 276 (Austl.); RSB 41.

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[11] *See, e.g.*, Accordance with Int'l Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 1, ¶ 56 (July 22); EU Br. 9–10.

Respondents' reliance on a concurring opinion in *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 63, ¶ 48 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal), is even more misleading. That case also concerned sovereign immunity. The quoted language does not state that international law prohibits the extraterritorial application of the ATS. To the contrary, the same opinion states "the only prohibitive rule [regarding the assertion of universal jurisdiction] . . . is that criminal jurisdiction should not be exercised without permission, within the territory of another State." *Id.* ¶ 54.[12]

All States recognize sovereign immunity as a limit on civil and criminal jurisdiction. Indeed, it is precisely because extraterritorial jurisdiction is so prevalent that sovereign immunity issues even arise.

C. The Principle of Universal Jurisdiction Supports ATS Jurisdiction in This Case.

The ATS is also valid as an exercise of prescriptive jurisdiction under universal jurisdiction

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[12] *Immunities of the State (Ger. v. It.: Greece Intervention)* ("Immunities"), 2012 I.C.J. ¶ 95 (Feb. 3), cited in Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party at 16 n.25 (No. 10-1491) (filed June 13, 2012) also concerns sovereign immunity, not universal civil jurisdiction.

principles .[13] *See Sosa*, 542 U.S. at 762-63. (Breyer, J., concurring). Even in a case between foreign parties for a claim arising on foreign soil, the U.S. has prescriptive jurisdiction over violations of certain human rights norms, including the norms Petitioners rely upon. *See* Restatement Third, §§ 404, 702.[14]

The principle that universal criminal jurisdiction includes civil remedies is widely accepted. *See* EU Br. 17–18; Brief of *Amici Curiae* Comparative Law Scholars and French Supreme Court Justice in Support of Petitioners on the Issue of Extraterritorial Jurisdiction at 30 (10-1491) (filed June 2012) ("Comp. Law Br.").

In many, if not most, civil law jurisdictions, private citizens may initiate criminal proceedings which include civil remedies for the victims. Comp. Law Br. 27. Respondents' claimed separation of

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[13] The United States need rely on universal jurisdiction only when other jurisdictional bases are absent. Where the offending conduct is committed on U.S. territory, or threatens U.S. interests, EU Br., 12, or is committed by U.S. nationals, the United States indisputably may exercise prescriptive jurisdiction, even if the ATS is found to be a projection of U.S. law. Restatement Third, §§ 402, 404; *see also* EU Br. 11-13; *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941) ("The United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nationals or their nations are not infringed.").

[14] *See* Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 156 (2006); EU Br. 11.

universal criminal jurisdiction and civil remedies simply does not exist. RSB 40–43. *Sosa*, 542 U.S. at 762–63 (Breyer, J., concurring); Comp. Law Br. 18–21. In the United States, the availability of tort remedies has *never* depended on criminal proceedings, even though tort claims are frequently based on criminal conduct.

Respondents' argument that prosecutorial discretion renders universal criminal jurisdiction acceptable and its absence makes universal civil jurisdiction unacceptable has no basis in law.[15] It reflects a profound misunderstanding of other legal systems, and the relationship between criminal and tort law in our own. *See* Comp. Law Br. 2–15. The ATS is similar to foreign universal jurisdiction statutes. *Id.* 30; Yale Br. 35. Whether to condition civil remedies on prior prosecutorial decisions is a matter left to each State under international law. PSOB 46–48; EU Br. 30–34.

Respondents claim that *Sosa* bars universal jurisdiction over civil claims in the absence of universal acceptance of that procedural form and domestic remedy. RSB 44. But *Sosa* specifically rejected the argument that international law must provide a cause of action in an ATS case. *Sosa*, 542 U.S. at 727, 731–33; *see also id.* at 761 (Breyer, J., concurring) (noting that universal jurisdiction was a

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[15] Prosecutorial discretion is a safeguard against the threat prosecution poses to liberty. The common law tort system has never been thought to require this additional layer of protection.

"further consideration" that the majority did not require).

The provision of civil remedies for universal jurisdiction crimes is sometimes required, but is always permissible. EU Br. 17–19. No international law principle allows States to impose criminal sanctions on engaging in torture or crimes against humanity but prohibits them from establishing civil remedies for the same conduct.

IV.

THE UNITED STATES POSITION SHOULD NOT REPLACE EXISTING DOCTRINES THAT ADEQUATELY ADDRESS ANY CONCERNS RELATING TO THE LITIGATION OF EXTRATERRITORIAL ATS CLAIMS IN U.S. COURTS.

The United States correctly notes that the presumption against extraterritoriality does not apply to the ATS and that it does not violate international law. USSB 3, 14 n.3. The United States also endorses the consensus since *Filartiga* that the ATS reaches conduct arising on foreign soil, USSB 6, 10, and acknowledges that Congress embraced and extended *Filartiga* in the TVPA. *Id.* 10-11. Thus, the United States rejects Respondents' most extreme positions.

The United States, however, erroneously argues that a private right of action should not be allowed in this case because the conduct has no

substantial connection with the United States and Respondents "are not exclusively present" here. *Sosa* held that the ATS affords jurisdiction over a cause of action, such as mass killing or torture, no matter where it arises, even if prudential concerns ultimately lead to dismissal based on other doctrines. *Sosa*, 542 U.S. at 732.

The Government errs in conflating the substantive international law giving rise to a *Sosa*-*qualifying* claim with the various prudential doctrines that might limit ATS jurisdiction in particular cases. The United States truncates the analysis required by established doctrines in order to circumvent their limits and without taking into account the considerations in favor of jurisdiction. The United States position ends up resting on a subjective opposition to this particular case in the absence of the factual record ordinarily required before a case is dismissed or transferred to a more appropriate forum. The U.S. position also makes judicial determinations of whether to recognize an ATS cause of action dependent on a case-by-case assessment by the Executive Branch.

This Court should not abandon the established doctrines applicable in all transnational cases in favor of the amorphous methodology of the U.S. proposal. *See* PSOB 52-58. The established doctrines themselves provide a coherent time-tested method for determining whether a particular transnational case should be heard in federal court. *See generally* Brief of Civil Procedure Professors as *Amicus Curiae* on

Reargument in Support of Petitioners (10-1491) (filed June 11, 2012).

The case-by-case sensitivity of the *forum non conveniens* doctrine, for example, is more appropriate than the blanket rule proposed by Respondents or the approach suggested by the United States. *See* Supplemental Brief of Former United States Government Counterterrorism and Human Rights Officials as *Amici Curiae* in Support of Petitioners at 7, 32 (No. 10-1491) (filed June 13, 2012).

Similarly, the act of state doctrine precludes courts "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Sabbatino*, 376 U.S. at 401. But it does not apply where a plaintiff's claims are based on clear international legal standards of conduct. *Id.* at 423. The act of state doctrine and foreign sovereign immunity, *inter alia*, are sufficient to protect the interests of foreign sovereigns in ATS cases.

Similarly, there is nothing to support the argument advanced by Respondents (RSB 35) and the United States (USSB 13, 19–20) that the ATS is limited to violations for which the U.S. might be held responsible. The ATS demonstrated a commitment to enforcing the law of nations. Historians' Br. 4. If the United States may be thought responsible for harboring a torturer like Pena-Irala (USSB 4), it might also be thought responsible for sheltering corporations who have abetted mass murder or genocide. In either case the United States provides a

safe haven for perpetrators of egregious human rights violations.

The United States' seminal submission in *Filartiga*, declaring that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights," remains as true today as it did in 1980. *See Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala* (2d Cir. 1980), *reprinted in* 19 INT'L LEG. MATS. 585, 601-604 (1980); *see also* Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94-9035 (2d Cir. 1995) (affirming the remedial reach of the ATS for wrongs committed in foreign territory).[16] And it remains as true in cases of corporate complicity in universally-condemned human rights violations as it does in cases involving individual defendants.

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[16] The United States has also repeatedly assured the international community that the ATS as interpreted in *Filartiga* and its progeny embodies this country's commitment to international law and justice. *See*, e.g., U.N. Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: *United States of America*, U.N. Doc. CAT/C/28/Add.5 (2000) ¶ 277.

V.

RESPONDENTS AND THEIR *AMICI* SHOULD ADDRESS THEIR POLICY ARGUMENTS TO CONGRESS.

Respondents' alarmist arguments about economic harm, invasive discovery, extorted settlements, and reputational harm echo claims made before *Sosa*, but none of the predicted dire consequences have occurred. In any event, such arguments should be directed to Congress. *NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61, 83-84 (1985). This Court lacks the investigative capacity to test their factual assertions.

There is no empirical evidence that ATS actions have reduced foreign investment or caused the effects claimed by Respondents and their *amici*.[17] Brief of Joseph E. Stiglitz as *Amicus Curiae* in Support of Petitioners at 10–15 (No. 10-1491) (filed December 21, 2011) ("Stiglitz Br.").

In general, ATS cases are no more lengthy or expensive than other complex litigation. Brief on Reargument of Institute for Human Rights and Business as *Amicus Curiae* in Support of Neither Party at 8–18 (No. 10-1491) (filed June 13, 2012).

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[17] Respondents claim, for example, that the ATS was responsible for Talisman Energy, Inc's withdrawal from Sudan, RSB 52-53, but Talisman was actually encouraged to pull out by U.S. legislators and public pressure in Canada. Stiglitz Br. 11 n.11.

There is no evidence that settlements, mostly court-approved, have been extorted. *Id.* 19, 27, 31 (discussing settlements in several ATS cases). Reputational harm is linked to the underlying conduct rather than to ATS cases. *Id.* 33. The existence of the ATS may improve business standards, and reward those businesses that respect basic human rights standards. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); Stiglitz Br. 7–9.

CONCLUSION

The ATS remains a last resort for human rights victims with no adequate alternative fora. Petitioners received asylum in this country as a result of the human rights violations they suffered at the hands of the Nigerian dictatorship and Respondents. They filed this suit in New York because Respondents were present there and there was no practical alternative forum. In this sense they were in no different circumstances than the Filartiga family.

The First Congress opened the federal courts to tort claims by aliens seeking redress for violations of the law of nations. Petitioners seek to redeem that promise in their adopted homeland against corporations responsible for their suffering and exile. There is no reason to shut the door on their claims.

For all these reasons the Court of Appeals judgment should be reversed and Petitioners should at long last be given their day in court.

Dated: August 31, 2012

Respectfully Submitted,

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APPENDIX A

MINISTER
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

The Honourable Judge Shira A. Scheindlin
United States District Judge
United States District Court
Southern District of New York
United States Court House
1500 Pearl Street
New York
New York
10007 - 1581
United States of America

Dear Judge Scheindlin

IN RE SOUTH AFRICAN APARTHEID LITIGATION (02 MDL 1499) - LUNGISILE NTSEBEZA et al; and KHULUMANI et al.

On the 8th April 2009, the United States District Court, Southern District of New York, per Shira A. Scheindlin U.S.D.J. issued an opinion in part upholding the Plaintiff's motion and in part denying it. The court also dismissed the plaintiffs' motion to

re-solicit the views of the Governments (of the Republic of South Africa and the United States of America).

In its conclusion the court stated that "corporate defendants merely accused of doing business with the apartheid Government of South Africa have been dismissed. Claims that a corporation that aided and abetted particular acts could be liable for the breadth of harms committed under apartheid have been rejected. What survives (in terms of claims) are much narrower cases that this Court hopes will move toward resolution after more than five years spent litigating motions to dismiss."

The remaining claims are based on aiding and abetting very serious crimes, such as torture, extrajudicial killing committed in violation of international law by the apartheid regime.

The Court in dismissing the claims based solely on the fact that corporations merely did business with the apartheid government also addressed some of the concerns which the Government of the Republic of South Africa had.

The apartheid issue and the role of business were canvassed by the Truth and Reconciliation Commission during its hearings. Its report and recommendations were acted upon by the Government of the Republic of South Africa in a manner it considered to be appropriate. The Government believes that it would not be prudent to

continually have to re-state its position in response to all the motions filed in connection with these claims, pending the final adjudication by the District Court.

The Government of the Republic of South Africa, having considered carefully the judgement of the United States District Court, Southern District of New York is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law.

The Plaintiffs have, separately, indicated to the Government of the Republic of South Africa their desire to have the matter resolved outside of the court process generally with resolution in the Republic of South Africa, if possible. The Government of the Republic of South Africa welcomes this development and would be willing to offer its counsel to the parties in pursuit of a settlement, if requested to do so by the parties.

Respectfully yours,

J. Radebe

JEFFREY THAMSANQA RADEBE, MP
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

cc: Clerk United States Court of Appeals for the Second Circuit